Supreme Court of the United States.

DECEMBER TERM, 1869.

No. 51.

HENRY PELHAM

vs.

DAVID G. ROSE, GEORGE B. ROBERTS, SETH WAY, ISAAC B. COPLIN, SETH EATON, AND ABRAM HUPP.

ON CERTIFICATE, &c., FROM CIRCUIT COURT OF THE UNITED STATES, DISTRICT INDIANA.

Brief of Defendants.

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BRIEF OF DEFENDANTS.

The act of Congress of July 17, 1862, (Statutes at Large, vol. 7, p. 589,) authorizing the seizure and confiscation of the property of rebels, provides (sec. 6, p. 591) that under certain circumstances all the "estate and property, moneys, stocks and credits" of a rebel, shall be liable to seizure, and that for the purpose of enforcing such seizure (sec. 7) proceedings *in rem* shall be instituted in any district court for a district within which the property may be found, which proceedings shall conform as nearly as may be to proceedings in admiralty and revenue cases.

It seems that under this statute the attorney of the United States for the district of Indiana, on the 30th day of April, 1863, filed his libel of information against certain "credits and effects" of Henry Pelham, (the plaintiff in this suit,) "that is to say, one promissory note for the sum of $7,000, dated March 1, 1862, and due four years after date, executed by Lewis Pelham to the said Henry Pelham."

A writ of monition was issued, directed to David G. Rose, the then marshal of the district, but who has since deceased, which, after referring to the libel, ordered him to attach the note and detain the same in his custody, and to give notice to persons claiming the same, &c.

On the 2d day of May, 1863, Rose, by his deputy, made the following return to the writ:

"In obedience to the within warrant, I have arrested the *property* within mentioned, and have cited all persons having or pretending to have any right, title, or interest therein, as by the said warrant I am commanded to do."

The district court took the matters and things charged in the libel as confessed; condemned the promissory note as forfeited to the United States, and directed that the clerk should issue a decree of *venditioni exponas*, by virtue of which the marshal was commanded to sell the promissory note and all interest of said Henry Pelham therein, and he was authorized to deliver to the purchaser a certificate of purchase, &c.

The marshal made return that on the 5th day of September, 1863, he sold the promissory note to Lewis Pelham for $3,000.

Said Henry Pelham now brings this action against Rose and his sureties for a false return to the writ of monition, alleging, as showing its falsity, that the marshal never in fact seized the note, but that ever after its execution, and until after the decree and confiscation, it was in the custody and possession of himself, the plaintiff, in Mason county, in the State of Kentucky, and was never within the territorial limits of the State of Indiana.

To this declaration Rose demurred.

The judges of the circuit court differed in opinion on this demurrer, and ordered that the following points of difference be certified to this court:

1st. Whether, upon the facts stated in the said declaration, it was material and necessary to the due and legal service and execution of the writ of monition therein set forth, by the said David G. Rose, marshal as aforesaid, that he should have actu-

ally seized and taken into his custody and under his control the promissory note mentioned in the declaration.

2d. Whether the return to said writ of monition, as set forth in said declaration, must be construed to mean that the said marshal had actually taken into his custody and under his exclusive control the said promissory note.

3d. Whether, on the hypothesis that all the matters set forth in said declaration are true, the judgment and proceedings in the district court, as therein stated, would estop the said plaintiff to maintain an action on the said promissory note against the maker thereof.

The plaintiff contends that the act of Congress above cited, and the libel and proceedings in the district court, contemplated the literal paper writing which constituted the evidence, or, at all events, one kind of evidence of the debt due from Louis Pelham to the plaintiff, as being in this case "the estate, property, and credits" enumerated in the act, the "credits and effects" mentioned in the libel, and the "property" mentioned in the return.

The defendants, on the contrary, contend that the debt owing from Louis Pelham to Henry Pelham, the alleged rebel, and not this mere evidedce of indebtedness, was the "property and credit" meant, and that particular mention of the promissory note in the libel and subsequent proceedings was only descriptive of the credit.

The plain meaning and effect of the proceedings is the same as if the description of the property in the libel had been "the following described credits and effects of one Henry Pelham; that is to say:" a credit evidence by one promissory note for the sum of $7,000, &c.; or, had the debt been evidenced and secured by a mortgage, and had the libel been against "the following described credits and effects of one Henry Pelham;" that is to say: one mortgage for the sum of $7,000, &c., and had the return to the writ been, "I have arrested the property within mentioned," no one would imagine that the literal paper writing was the property or thing

intended. We may carry the illustration further, and suppose the libel had been against "the following described credits and effects of one Henry Pelham; that is to say:" one book account for $7,000, due and owing from one Louis Pelham, &c.; and had the return been: "I have arrested the property," &c. In such a case it would be plainly absurd to contend that the literal book account, even though containing at the foot, a written acknowledgment of its being just, was the property and credit sought to be confiscated, or the "property alleged to have been arrested by the marshal." In such a case, all men would at once agree that the credit, not the literal account, was the property intended, and that the specific mention of the book account, however minute, was only a mode of describing the credit. There is no substantial difference between the effect of the description in the two cases supposed and the one now before the court.

It will be borne in mind that in the return alleged to be false—that on which the jurisdiction of the court depended—the marshal does not say that he has arrested the note, but that he has arrested the property. Hence it is perfectly fair for us to look, as did the marshal, beyond the mere letter of the libel and writ, at the real substance and intention of the act of Congress and of the writ and return; and it becomes of the very essence of the inquiry, what was the property to which reference is made in the act and in these proceedings, and especially in the return?

Such evidences of credit are always presumed to be in the possession of the creditor. The rebels against whom the act in question was directed, were presumed to be within the rebel lines, where the marshal could not go, and had no right to go to seize a promissory note, mortgage, or any other evidence of a credit. Hence, if such a literal seizure of the evidence was intended, the act was mainly inoperative and incapable of execution, and the libel exhibited by the district attorney in this proceeding, was irrational and absurd. All men know that the idea of such a literal seizure of the evidence in a case like this, never entered the mind of any legislator engaged in the passage of the act.

The literal seizure of the promissory note was no more necessary to an arrest of the property in this case than it would be in the ordinary case of an attachment against the credits of a non-resident party, whose credits happened to be evidenced by promissory notes. The marshal, looking beyond any mere words, at the substance of the proceeding, which was against the credits and effects of Henry Pelham, namely: a debt due from Lewis Pelham, a resident within the jurisdiction of the court, cites Lewis Pelham and all others interested to appear in court and defend, and certifies, as a correct construction of law, that he has arrested the property referred to in the writ.

He evidently intended the same as if he had expressed his conclusion of law thus: I have arrested the credit within mentioned; for the credit was the property; or as if he had said: I have arrested the property within mentioned by citing all persons interested, &c.

In this case the property sought to be confiscated, namely, the debt due from Lewis Pelham to the plaintiff, was an intangible thing, and the plaintiff argues in his brief, as if such an intangible thing could not "be found," in the language of the act, in any other district than that where the note might be; that such an intangible thing could not be seized; and the act requiring the proceedings to conform substantially to proceedings *in rem*, in admiralty and revenue cases, in which the seizure of a tangible thing is always possible and necessary, a literal seizure of the note as a tangible thing must have been contemplated, and must be inferred from the return.

But we reply that the act plainly contemplates the confiscation of mere credits, and does not require that the proceedings shall be in strict conformity with those in admiralty and prize cases; only "as nearly as may be," and evidently contemplates such a deviation from those forms as may be necessary or expedient for the purpose of reaching debts due from citizens of loyal States to rebels; corporate stocks of the loyal States owned by disloyal persons, &c.

In such cases the *rei situs* of the intangible thing is the resi-

dence of the debtor or of the corporation. That is the district where the property can be found, and where proceedings, *in rem*, may be instituted; otherwise the act was, as to its main purpose, wholly inoperative. It could never be necessary to hunt up the rebel in order to literally seize his stock-certificate, mortgage, promissory note, or any other evidence of his title or right to the property. In case of proceedings to confiscate bank stock, for instance, the seizure would be by citing the bank, and any other parties in interest within the jurisdiction, to appear and answer to the libel; and the location of the bank would determine the district within which the jurisdiction would attach.

The property in this case did not exist in duplicate. It was either the credit, or it was the note—not both. But the note—the paper writing—might have been destroyed or lost without in the least impairing the credit or detracting from its collectibility or essential value. In this case it had not even obtained any special value as evidence under the law merchant, by a transfer to a *bona fide* purchaser, but it remained in the hands of the original holder. And yet the plantiff insists that it must be inferred that the marshal intended that he had literally seized the note, when he returned that he had arrested "the property." Had the proceeding been against a book account for $7,000, &c., and had the marshal made a similar return, the plaintiff might, by parity of reasoning, and with almost equal plausibility, argue that the return necessarily implied a literal seizing of the book in which the account was entered, and that such a return would be false, and subject the marshal and his sureties to damages, unless he had gone into the enemy's country and actually obtained possession of the book.

Unless our view of the case is utterly at fault, the untenableness of the plaintiff's position is too plain for argument, and the multiplying of illustrations is needless.

We submit that the whole case is an effort to involve the sureties of this marshal, by the merest torturing of words, against the plain intent and substance of the return and proceedings,

and we insist that the first and second questions must be answered in the negative.

2d. On the presumption that either the first or second question be answered in the negative, the answer to the third becomes immaterial to the determination of this suit, but we proceed to consider it briefly.

In our view of the case, that the credit was the property involved, we presume that the proceedings in the district court would estop the plaintiff to maintain an action on the promissory note, against the maker; but as, in such a view of the case, that inquiry is immaterial, and would only be anticipating a controversy which may possibly arise between this plaintiff and Lewis Pelham, we forbear to discuss it.

But in the plaintiff's view of the case, that the paper writing was the veritable property involved in the proceedings, as distinctly as a gold watch sought to be confiscated would be the property, then we insist that, according to the plaintiff's own explicit statement and showing, his right to the note and to every possible benefit to be derived from it has not been in the slightest degree impaired.

The plaintiff has, in his brief, sufficiently established by authority, were authority required on so plain a proposition, that in proceedings *in rem*, an actual seizure and possession of the *res* is indispensable to the effectual exercise of jurisdiction by the court; while he at the same time not only admits, but avers that the *res*—being as he contends the literal paper writing or promissory note—was never seized by or in the "custody, possession, or sight of the marshal, or of any deputy of his for a single instant of time between the date of the delivery to him of the said writ and the return thereof by him to the clerk's office, but that ever after the execution of the note, and during the commencement and pendency of the said suit, and until long after the said decree and order of confiscation, the said promissory note was in the custody and possession of the plaintiff, in Mason county, in the State of Kentucky; and during all the time aforesaid, the said promissory note was

never within the territorial limits of the said State of Indiana." This, on the plaintiff's theory of the case, that the literal note was the *res*, and that the return by the marshal, that he had "arrested the property," necessarily implied that he had actually taken the note into his exclusive custody and control, presents the broad question whether a judgment *in rem*, regular upon its face, but where it is admitted that the court never in fact had any jurisdiction either of the property in question or of the person of the owner can have the effect to create transfer or destroy the title in the property; in other words, whether a judicial proceeding, which is good upon its face, but which is admitted to have been wholly feigned and fictitious, can estop a party of whose person or property the court never, in fact, had any jurisdiction whatever. Suppose, for illustration, that these proceedings by the district attorney had been with a view to confiscate a gold watch or a case of jewels, which are now admitted to have been all the while in the personal possession of the alleged rebel, beyond the jurisdiction of the court, within the rebel lines, or in England. In such a case, there being no seizure, the jurisdiction of the court could not attach, and the idea that the decree—such facts being admitted—could be used to take the watch out of the owner's pocket and transfer it to an alleged purchaser under the decree, is simply absurd.

We admit that the case supposed is an apparent exception to the general rule that judicial proceedings imply absolute verity. It is difficult to find in all the history of admiralty and revenue cases, or of proceedings *in rem*, a case parallel to this. In admiralty and revenue cases, to which these proceedings are required to conform, as far as practicable, there is always a tangible, corporeal thing, such as a ship or an article of merchandise, to be seized, and probably no officer of the law ever had the effrontery to certify officially that he had actually taken into his possession such an article, when, in fact, it was all the while in the possession of the owner, in a foreign jurisdiction.

To illustrate further: On the plaintiff's view of the case, that the paper writing was the property in controversy, the effect

of the proceedings is the same as if the action had been in admiralty, against a ship admitted to have been (to quote again from the declaration) "all the time during the commencement and pendency of the suit, and until long after the decree," in the Indian ocean, on its way to China. Who will contend that the return of the officer that he had arrested the ship, and afterwards that he had sold it, could have any effect to divest the owner, not cognizant of the proceedings, of his title to the ship? The idea is in conflict with every principle of justice and dictate of common sense. In such a case, the court having jurisdiction neither of the *rem* nor of the person of the owner, the whole proceeding would be *coram non judice* and void.

Some questions arising *in limine*, and which involve the jurisdiction of the court, especially in the class of cases *in rem*, must remain open to inquiry as an exception to the general rule, that a record imports absolute verity.

We cannot better illustrate our view of this point than by reference to the language of the supreme court of New York in *Starbuck* vs. *Murray*, 5th Wend., 157, which is quoted with approbation by this court in *Harris* vs. *Hardeman*, 14 Howard, 340, 341. "This doctrine does not depend merely upon adjudged cases, it has a better foundation; it rests upon a principle of natural justice. But it is contended that if other matter may be pleaded by the defendant, he is estopped from asserting anything against the allegation contained in the record. It imports perfect verity, it is said, and the parties to it cannot be heard to impeach it. It appears to me that this proposition assumes the very fact to be established, which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgment are void, and, therefore, the supposed record is in truth no record. If the defendant had not proper notice of, and did not appear to, the original action, all the State courts, with one exception, agree in opinion that the paper introduced, as to him, is no record; but if he cannot show, even against the pretended record, that fact, on the alleged ground of the uncontrollable

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verity of the record, he is deprived of his defence by a process of reasoning that, to my mind, is little less than sophistry. The plaintiff, in effect, declares to the defendant, the paper declared on is a record, because it says you appeared, and you appeared because the paper is a record. This is reasoning in a circle. The appearance makes the record uncontrollable verity, and the record makes the appearance an unimpeachable fact. Unless a court has jurisdiction it can never make a record which imports uncontrollable verity to the party over whom it has usurped jurisdiction, and he ought not, therefore, to be estopped from proving any fact which goes to establish the truth of a plea alleging the want of jurisdiction."

Such remarks would apply with, if possible, more force in regard to a case *in rem*, and their force in this case is scarcely weakened by the consideration that the facts of the cases in which they were made and quoted, were not parallel with the facts in this case. Nothing short of an undisputed and uncontrollable weight of authority could prevail over their intrinsic force, and we know of no such weight of authority which is other than merely nominal and technical.

The plaintiff, in the case at bar, comes into court with the note in question in his pocket, claiming that it—the paper in writing—is substantial property, which the Government sought to confiscate by a proceeding *in rem* against the paper writing itself; alleging that he has always had it in his possession beyond the district of Indiana, but insisting that by a proceeding in the court of that district, which never reached him or the paper writing, he has been deprived of his note, and is estopped from denying that he is deprived of it; therefore he is entitled to recover $7,000, its alleged value.

We, on the contrary, insist that, on such a showing, he is not estopped, and (on the theory that the paper writing was "the property") the third question should be answered in the negative.

Thus, whichever horn of the dilemma the plaintiff takes, he must fail. If he admits with us that the credit was the

property, he concedes the truth of the return. If, on the contrary, the literal promissory note was the property sought to be confiscated, then, according to his own showing, he is not estopped from still claiming it as his own.

Two other points may require a moment's notice. The plaintiff in his brief (pp. 14, 15) says: "The declaration avers that it (the note) was not seized under the mesne process; that down to the period of the adjudication of the case, it was never within the limits of the State of Indiana; but, *non constat*, that after the *venditioni* was issued, it did not in fact come to the hands of the marshal. Such a circumstance might have occurred, and it must be presumed did occur."

Now, it is the return to the writ of monition that is alleged to be false, and the court is invited to resort to a most violent presumption, unsupported by any allegation of the declaration, and (according to the plaintiff's showing) against all the probabilities of the case, in order to make out somehow that the note was seized and sold, in order that an estoppel may be inferred.

A writ of *venditione exponas* is an order to an officer to sell property already in his possession, and if (on the plaintiff's showing) the marshal wrested the note from him and sold it under the *vendi*, he was simply a trespasser, and his sureties cannot be held liable for such a naked act of trespass. When suit shall be brought for such a tresspass, it will be the proper time to answer to the charge.

The plaintiff, in conclusion, claims that the proceedings under the confiscation act are not analogous or equivalent to a garnishment in proceedings in attachment, inasmuch as they have to be likened, as nearly as practicable, to proceedings in admiralty and revenue cases, which are proceedings *in rem*, in which the arrest of a tangible thing is required.

But it is a sufficient answer that the proceedings in admiralty and revenue cases were referred to only as a general guide to the

courts. A main object of the law was to reach stocks, credits, &c., and the object shall not be defeated for the want of a sufficient writ. The course pursued in this case for "arresting" the credit was just and reasonable.

These last points, however, are not material to the questions before the court.

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JANUARY, 1870.